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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-5175

RANDALL DALE ADAMS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

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v.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO

THE TEXAS COURT OF CRIMINAL APPEALS

Randall Dale Adams, petitioner, prays that a writ of certiorari issue to review the order of the Texas court of criminal appeals affirming his conviction for capital murder and the imposition of the death penalty therefor on March 21, 1979.

OPINION BELOW

The opinion of the court of criminal appeals is reported at 577 S.W.2d 717, and is appended hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). This petition is timely filed pursuant to the order signed by Mr. Justice Powell on June 12, 1979.

QUESTIONS PRESENTED

1. Whether the exclusion from jury service of prospective jurors pursuant to TEX. PENAL CODE ANN. §12.31(b) (Vernon 1974) violated the holding in Witherspoon v. Illinois, 391 U.S. 510 (1968).

2. Whether, under the Texas statutory capital punishment scheme, psychiatric testimony constitutes competent evidence upon which to predicate the imposition of the death penalty, consistent with the Due Process Clause and Addington v. Texas, 99 S.Ct. 1804 (1979), and the Eighth Amendment.

3. Whether the prosecution's deliberate misrepresentation as to the existence of favorable evidence and the prosecution's failure to disclose favorable to the petitioner violated his rights as construed and applied in Brady v. Maryland, 373 U.S. 83 (1963).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> [C]ruel and unusual punishments [shall not be] inflicted.

The Fourteenth Amendment provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Court of Proceedings Below

The petitioner was indicted by the Dallas County Grand Jury for capital murder. Specifically, he was charged with the murder of a Dallas police officer. The petitioner plead not guilty. A jury found him guilty and, at the punishment phase of the trial, answered the three statutory punishment questions in the affirmative resulting in the imposition of the death penalty.

Dallas police officer Robert Wood was fatally shot by the driver of an automobile who he had stopped for a traffic violation. David Harris testified that he had stolen the car in which he and the petitioner were riding when Wood stopped the car, and that the petitioner shot Wood and then drove away. Harris admitted to several crimes which he had committed just prior to Wood's murder. Testimony was also adduced that Harris had stated to third parties that he (Harris) had shot Wood. Wood's partner and three

civilian witnesses (one of whom was Emily Miller) testified that the person who shot Wood bore similarities to the petitioner, but to Harris. The petitioner denied shooting Wood and said he was asleep in a motel room at the time of the shooting.

Facts Relevant to the Questions Presented

The facts relevant to the jury selection issue are discussed in more detail hereafter. Suffice it to say that several prospective jurors were excused by the court, upon the prosecution's motion and over the petitioner's objection, after they had been qualified under Witherspoon because they each stated on at least one occasion that the mandatory penalty of life or death required by Texas law would affect their deliberations on issues of fact in the case.

The facts relevant to the issue concerning the imposition of the death penalty under the Texas statutory scheme where the only evidence to support such penalty is psychiatric testimony are, quite simply, as follows: The only evidence which the prosecution adduced at the punishment phase of the petitioner's trial in support of the affirmative findings of fact required by Texas law to impose the death penalty was the testimony of two psychiatrists who both stated that they examined the petitioner for a brief period of time, that during such examination they evaluated him, and that based on such evaluation they concluded he would probably commit acts of violence in the future and that he thus constituted a threat to society. This was the sole evidentiary basis for the jury's affirmative finding that the petitioner was a threat to society, which affirmative finding directly led to the imposition of the death penalty in this case.

The facts relevant to the issue involving the prosecution's suppression of facts favorable to the petitioner are these: Emily Miller testified for the prosecution and identified the petitioner as the man who she saw shoot Wood. She was cross-examined by the petitioner and then excused from further appearance at the trial. Three days later the petitioner learned

that the prosecutor had in his possession a written statement given to the police well before trial in which she described the man she saw shoot Wood as "a mexican or a very light skinned black man". The record amply shows the petitioner to be white. It was then determined that Mrs. Miller had moved to an unknown address and was unavailable for further cross-examination. The trial court refused to allow the petitioner to introduce Mrs. Miller's pretrial statement into evidence.

The record further shows that prior to trial the petitioner requested that he be furnished with "statements of witnesses", "evidence which does or tends to impeach any of the witnesses for the State", "a list of all documents in the possession of the State concerning this case which the State does not intend to introduce into evidence", and "a list of statements by witnesses which the State does not intend to call to testify". Record on Appeal 33 - 34. At a pretrial hearing the trial court order compliance with the petitioner's request. Id. After jury selection was completed, but before the commencement of testimony, the prosecutor in charge of the case stated under oath that the State had no evidence favorable to the petitioner or inconsistent with the prosecution's theory of the case. Trial Transcript 25.

REASONS FOR GRANTING THE WRIT

I.

A writ of certiorari should be granted to determine whether the exclusion from jury service of prospective jurors violated the holding in Witherspoon v. Illinois, 391 U.S. 510 (1968). During the jury selection proceedings in this case, several jurors were excluded from jury service because they stated they could not take a special oath prescribed by Texas law in capital offenses even though the jurors were not irrevocably committed, prior to trial, to vote against the penalty of death regardless of the facts and circumstances that might emerge during the trial.

In response to the 1972 death penalty cases[1] the Texas legislature enacted a capital punishment scheme calling for a bifurcated trial on the issues of guilt/innocence and punishment. 1973 Tex.Gen.Laws, ch. 426, at pp. 1124-29. Under this law, if an accused is found guilty of capital murder, the jury's sole function at the punishment phase of the trial is to answer three statutorily prescribed questions. An affirmative answer to all three questions automatically results in the imposition of the death penalty; a negative answer to any one of the questions results in a life sentence.

Contained in this statutory capital punishment scheme is the following provision:

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

TEX.PENAL CODE ANN. §12.31(b)(Vernon 1974). Pursuant to this provision Texas prosecutors have been permitted to advise prospective jurors in capital cases of the effect of the answers to the three punishment questions, and then to require them to state under oath that the mandatory penalty of death or imprisonment for life will not affect their deliberation on any issue of fact. If a prospective juror refuses to make such statement, he is subject to being excused for cause upon the prosecution's motion.

[1] Furman v. Georgia, 408 U.S. 238 (1972).

During the voir dire examination in this case at least nine prospective jurors were excused by the trial court upon the prosecution's motion that they were not qualified under section 12.31(b), even though each of the prospective jurors had been qualified under the Witherspoon standards. On appeal of this case the Texas Court of Criminal Appeals said:

> [Petitioner] contends that by permitting the application of Sec. 12.31(b), supra, to the three punishment issues specified by Art. 37.071, V.A.C.C.P., the trial court bestowed upon the prosecution a broader basis of exclusion than that allowed under the rule of Witherspoon v. Illinois, [supra]. However, this Court has consistently held that the statutory scheme for the selection of jurors in capital cases in Texas, and in particular the application of Sec. 12.31(b), supra, comports with the constitutional requirements of Witherspoon.

Adams v. State, supra, at 728.

In Witherspoon this Court held that a venireman may be excused for cause when he is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. 391 U.S. at 522, n. 21. But, "[i]f the voir dire testimony . . . indicates that veniremen were excluded on any broader basis . . . the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Id.

The questioning of nine prospective jurors in this case - Mrs. Mahon, Mr. Jenson, Mrs. Coyle, Mrs. White, Mrs. Williams, Mrs. Andrews, Mr. Giuffrida, Mrs. McDonald and Mrs. Riddle - reflects that each expressed a belief favoring the death penalty; that some could and would assess the death penalty in a proper case if he were a juror while others stated a reluctance to vote for the death penalty; and that each stated on at least one occasion that the mandatory life or death sentence would affect his or her deliberation on issues of fact. Mrs. Mahon, Mr. Jenson and

Mrs. Coyle testified that they favored the death penalty and would, as jurors, vote for the death penalty in a proper case. Transcription of Court Reporter's Notes of Voir Dire Examination [hereafter "Tr. Voir Dire"] pp. 33 - 37, 351 - 57, 1023 - 25. Mrs. White, Mrs. Andrews, Mr. Giuffrida and Mrs. Riddle all expressed the view that they believed in capital punishment, but that they would find it difficult to vote in favor of the death penalty as a juror. TR. Voir Dire 1530, 2697, 2719, 4448, 4922. Mr. Williams was equivocal in his views about the death penalty, but was not automatically committed, prior to trial, to vote against the imposition of the death penalty. Tr. Voir Dire 2576 - 86. Mrs. McDonald said she did not believe in capital punishment, but stated that in an appropriate situation she could, as a juror, vote in favor of the death penalty. Tr. Voir Dire 4497. Each of the nine prospective jurors was qualified under Witherspoon to serve on the petitioner's jury. Yet, because each of them stated on at least one occasion that the mandatory punishment of life or death would affect his or her deliberation on an issue of fact, the trial court excused them at the prosecution's insistence, and over the petitioner's objection. And, significantly, of these nine, most were equivocal when asked about the effect of the mandatory punishment upon their deliberations and at least five of them - Mrs. Mahon, Mrs. Coyle, Mrs. White, Mr. Williams and Mrs. McDonald - said they could and would set aside their personal feelings and answer the three punishment questions based on the facts, without regard to the punishment that might be imposed as a consequence of thier answers. Tr. Voir Dire 65, 1059, 1548, 2601 - 02, 4543, 4553.

Recently, in Burns v. Estelle, 592 F. 2d 1297 (5th Cir. 1979), the court of appeals held that the exclusion of prospective jurors in a capital case in Texas upon the ground that they would not make the statement required by section 12.31 (b) violated Witherspoon and required a reversal of the death sentence imposed in that case. The court said in Burns that a prospective juror's statement that the mandatory penalty of death or life

would 'affect' his deliberations on any issue of fact in the case is not sufficiently unbending to meet Witherspoon standards. Id, at 1301.

> "[T]he mere reply by [the prospective juror] that the potential penalty would "affect" her is insufficient to permit her disqualification. Such an ambiguous answer spans the range of possible effects on her from a mere heightening of the seriousness with which she might approach her deliberations as a juror, through conscientious and moral dilemma foreseen, to an utter refusal to deliberate rationally at all. More than this was required for her disqualification . . .

Id, at 1301.

In the case sub judice, unlike the situation in Burns, points out the error complained of more clearly because here the prospective jurors who were excused under section 12.31 (b) qualified under Witherspoon by virtue of their testimony that they believed in the death penalty and that they could and would vote it as jurors. In Burns, the prospective jurors expressed opinions that they did not believe in capital punishment. This state of the record, coupled with a close reading of the prospective jurors' testimony in this case, leads to the conclusion that the testimony of the prospective jurors' regarding their inability to make the section 12.31 (b) statement indicated only that the jurors were expressing a "heightening of the seriousness with which [they] might approach [their] deliberations as juror[s]" and not "an utter refusal to deliberate rationally". For example, Mrs. Coyle said she could set aside whatever personal feelings she had about the mandatory punishment involved and answer the three punishment questions without being affected by the mandatory punishment. Tr. Voir Dire 1059. Mrs. White, Mr. Williams and Mrs. McDonald expressed feelings similar to Mrs. Coyle's. Tr. Voir Dire 1548, 2601 - 02, 4543, 4553.

To the extent that section 12.31 (b) authorizes the excusing from jury service of persons who are not, prior to trial, irrevocably committed to vote against the death penalty, the Texas statute creates an impermissibly broader-than-Witherspoon basis for excluding jurors in a capital case because of their feelings about the infliction of capital punishment. Burns v. Estelle, supra, at 1301. Application of that statute in this case denied

the petitioner his rights secured under Witherspoon.

A writ of certiorari should be granted to enforce the Burns decision in this case because Burns represents the correct approach to resolving the conflict between Witherspoon and application of section 12.31(b), as it was applied in this case.

II.

This Court should issue a writ of certiorari to review the death sentence imposed in this case because there is no competent legal evidence supporting the death sentence, as is required under Texas law.

One of the three punishment questions enacted by the Texas legislature in 1973 was whether there is a probability the accused would commit acts of violence in the future. TEX.PENAL CODE ANN. §37.071(b)(2)(Vernon 1979). Under Texas decisional law, there must be sufficient evidence to support a "yes" finding by the jury. The absence of sufficient evidence to support an affirmative answer to such special issue requires a reversal of the death penalty. Warren v. State, 562 S.W.2d 474 (Tex. Crim. App. 1978).

In this case the only evidence which the State adduced to support an affirmative finding to the special issue regarding the probability of the petitioner committing an act of violence in the future was the testimony of two psychiatrists who, after briefly examining the petitioner, testified that on the basis of their examinations they felt that there was a probability he would commit acts of violence in the future.

The court of criminal appeals noted that the petitioner's only prior criminal conviction was for driving an automobile while intoxicated, and noted further that he had been absent without leave while in the Army. However, the court held that "[the psychiatrist's] testimony, when considered with the evidence of the crime itself, which was a particularly senseless and motiveless killing, is sufficient to support the jury's

determination that [the petitioner] would constitute a continuing threat to society." Adams v. State, 577 S.W.2d 717, 730.

Since the decision in Adams, this Court has declared psychiatric diagnoses to be to uncertain to constitute legally binding evidence in situations where the reasonable doubt standard is applicable. Addington v. Texas, 99 S.Ct. 1804, 1812 (1979). Professor Dix reaches just that conclusion in his approach to the use of psychiatric testimony to support affirmative findings on the special issue used in the Texas captial punishment scheme. Dix, The Death Penalty, "Dangerousness, Psychiatric Testimony, and Professional Ethics, 5 Am.J.Crim.L. 151 (1977). If the "uncertainties of psychitric diagnosis" pose an unreasonable barrier in a civil commitment case so that a reasonable doubt standard may not be constitutionally required in such cases, it follows that where the reasonable doubt standard is constitutionally required (as in the punishment phase of Texas capital punishment cases) those same 'uncertainties' must be given equal weight. The inevitable conclusion is that psychiatric testimony cannot be legally competent evidence sufficient to support a jury's affirmative finding that a person will probably commit acts of violence in the future and thus be a threat to society, all of which leads to the imposition of the death penalty in Texas.

In view of this Court's correct and proper recognition of the "uncertainties of psychiatric diagnosis", the issuance of a writ of certiorari is most appropriate in this case to resolve the conflict between Addington and the holding of the court of criminal appeals that psychiatric diagnosis is, by and of itself, a sufficient basis upon which the State may take the life of a citizen as punishment for criminal acts.

III.

A writ of certiorari should be granted to review the decision of the court of criminal appeals in this case regarding the failure of the prosecutor to reveal to the petitioner's counsel the existence of material

within his knowledge which was highly favorable to the petitioner.

Prior to trial, pursuant to the petitioner's motion for the disclosure of favorable evidence, the prosecutor in charge of this case testified that he had no evidence in his possession or within his knowledge that "would go to show the innocence of this Defendant", that "would be inconsistent with [the prosecution's] theory of the Defendant's guilt", or that "would go to exculpate the Defendant". Transcript of Trial Proceedings [hereafter "Tr. Trial"] 25. It was later established that the prosecutor had a statement made by Emily Miller, a prosecution witness who identified the petitioner as the person who shot and killed the deceased, that the person who she saw shoot the deceased was "either a mexican or a light skinned blackman". Defendant's Exhibit No. 17. Since the petitioner is white, Mrs. Miller's statement was supportive of the petitioner's lone defense that he was mistakenly identified. Tr. Trial 64, 343, 1406; State's Exhibit Nos. 5, 5A, 18, 20A, 21, 24.

The petitioner advanced his claim before the court of criminal appeals that the prosecutor's action in withholding Mrs. Miller's statement, which was inconsistent with her trial testimony, violated Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. The court responded that the Texas procedure requiring disclosure of such material at trial rather than prior to trial satisfies the due process requirement of Brady, and held that the failure of petitioner's counsel to request Mrs. Miller's statement after she testified effectively waived any error involved. Adams v. State, 577 S.W.2d 717, 723 (Tex. Crim. App. 1979). Specifically, the court held that the failure of the prosecutor to reveal the existence of Mrs. Miller's statement prior to trial was not error because he was not required to do so under Texas procedures, and the failure of the petitioner to request Mrs. Miller's statement during the trial, as required by Texas procedure, waived whatever error existed in the prosecutor's failure to divulge the statement in question. Id.

Under Brady it is clear that the petitioner was constitutionally entitled to Mrs. Miller's statement because it was inconsistent with her inculpatory testimony and it was supportive of the petitioner's sole defense of mistaken identification. The court of criminal appeals clouded the issue by the mechanical application of state procedures and has overlooked two critical aspects of the matter: first, the prosecutor's impropriety in testifying at the pretrial hearing that he did not have any exculpatory matters in his possession when the record shows that he did have Mrs. Miller's exculpatory statement in his possession at that time, and, second, that the petitioner's right to Mrs. Miller's statement cannot be circumvented by application of Texas rules of procedure which thwart not only constitutionally secured rights but also the integrity of the fact-finding process.

In United States v. Agurs, 427 U.S. 97 (1976), this Court enumerated three situations where Brady considerations apply. The second situation arises when there is a pretrial request for specific evidence. The failure of the prosecution to properly respond to a specific and relevant request is "seldom, if ever, excusable." Id, at 106. It is just that situation that exists in this case, colored by the prosecution's purposefully misleading statement that favorable evidence did not exist. The prosecutor was in possession of a statement that was exculpatory and critically tested a prosecution witness on the crucial portion of her testimony - her identification of the petitioner as the guilty party. The petitioner's specific pretrial request for just such information was sufficient to invoke his rights under Brady. The prosecution's failure to timely and properly respond to the petitioner's pretrial request violated the holding and spirit of Brady.

The prosecutor's pretrial sworn statement that he did not have any material favorable to the petitioner heightened and aggravated the harm. By advising the petitioner under oath that he had no favorable evidence, he created the atmosphere in which the petitioner's trial counsel failed

to renew his request for Mrs. Miller's statement immediately after she had testified, as is required under Texas procedure. Surely the petitioner's counsel felt the right to rely upon the prosecutor's sworn statement, in response to the trial court's order to produce favorable evidence, that no favorable evidence existed when Mrs. Miller completed her testimony at the trial. Whatever blame the petitioner's trial counsel must bear for not renewing their request for favorable evidence during the trial, it must be laid, at least in some part, at the feet of the prosecutor who deliberately, under oath, misled them as to the non-existence of favorable evidence at the pretrial hearing. The prosecutor's actions of purposefully misleading the petitioner regarding the existence of favorable evidence are violative of the spirit of Brady in the context of this case where the prosecutor was in possession of favorable evidence and deliberately failed to disclose it upon demand and court order, and deliberately stated that no such evidence existed.

Finally, this Court has shown a reluctance to accept the mechanical application of state law and procedure which defeats the ends of justice. Green v. Georgia, 99 S.Ct. 2150 (1979); Chambers v. Mississippi, 410 U.S. 284 (1973). The holding of the court of criminal appeals in this case is a prime example of the application of a state procedure in a highly mechanical fashion that defeats the very essence of a trial. The petitioner made a pretrial request for favorable evidence in a timely and proper manner. The trial court responded by ordering the prosecutor to comply with such request. When the prosecutor stated that no such evidence or matters existed, the petitioner had the right to believe that representation and to act upon it consistent with the holding in Brady. The holding of the court of criminal appeals in this case destroys any right of an accused to believe any representation of a prosecutor respecting court-ordered discovery, and compels attorneys and accused to proceed in Texas courts in the manner of 'trial by ambush' - the very evil which Brady sought to

cure. By requiring the petitioner's to renew a pretrial request for favorable evidence during the trial, in the wake of the prosecutor's representation made prior to trial that no favorable evidence existed, to preserve the error of the prosecution's failure to furnish favorable evidence to the petitioner, the court of criminal appeals has mechanically applied a rule of state procedure to circumvent the clear holding of Brady, and has blessed a prosecutor's deliberate misrepresentation of fact regarding the truth of the crucial part of a witness's testimony. This Court cannot, consistent with Brady, tolerate the lower court's holding in this case.

A writ of certiorari should issue to review the holding of the court of criminal appeals that the petitioner's failure to comply with Texas procedures constitutes a waiver of his rights under Brady given the timely, proper and specific demand for the information that was withheld and given the prosecutor's deliberate misrepresentation respecting the non-existence of facts that constituted favorable evidence to the petitioner.

PRAYER

The petitioner respectfully prays that this Court issue a writ of certiorari to the court of criminal appeals to review this case for the reasons stated above, and that this Court reverse the petitioner's conviction and sentence of death.

Respectfully submitted,

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